BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOSEPH W. ANGEL, II, Petitioner, vs. CITY OF PORTLAND, Respondent, and GARY MARSHEL, LOIS WAKELIN, RICHMOND NEIGHBORHOOD ASSOC., MT. TABOR NEIGHBORHOOD ASSOC., SOUTH TABOR NEIGHBORHOOD ASSOC., and LAURELHURST NEIGHBORHOOD ASSOC., Intervenors-Respondent.	LUBA No. 91-192 FINAL OPINION AND ORDER

Appeal from City of Portland.

Stephen T. Janik and Richard H. Allan, Portland, filed the petition for review. With them on the brief was Ball, Janik & Novack. Stephen T. Janik argued on behalf of petitioner.

Ruth Spetter, Portland, filed a response brief and argued on behalf of respondent.

Edward J. Sullivan, Portland, filed a response brief and Timothy J. Sercombe, Portland, argued on behalf of intervenors-respondent Marshel and Wakelin. With them on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

Vincent P. Salvi, Portland, filed a response brief and argued on behalf of intervenors-respondent Neighborhood Assoc. With him on the brief was Weiss, Jensen, Ellis & Botteri.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 02/14/92

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the Portland City Council denying his application to change the zoning of a 0.7 acre site from High Density Single Family Residential (R5) to General Commercial (C2).

MOTIONS TO INTERVENE

Gary Marshel, Lois Wakelin, Richmond Neighborhood Association, Mt. Tabor Neighborhood Association, South Tabor Neighborhood Association and Laurelhurst Neighborhood Association move to intervene in this proceeding on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

This is the second time a city council decision denying petitioner's application for a zone change has been appealed to this Board. In Angel v. City of Portland, ___ Or LUBA ___ (LUBA No. 90-108, March 6, 1991) (Angel I), slip op 4-5, we set out the relevant facts as follows:

> "Petitioner owns the subject property and applied for a zone change from R5 to C2 to allow construction of a fast food restaurant (with drive-through window) and accompanying parking lot. The property is designated General Commercial on the Portland Comprehensive Plan (plan) map. The property is located along SE 39th Ave., on the block south of SE Hawthorne Blvd. Three single family residential structures are currently located on the property."

After the city's first decision was remanded by

Angel I, the city council held additional evidentiary hearings.[1] On October 28, 1991, the city council adopted the challenged order denying the proposed zone change.

SECOND ASSIGNMENT OF ERROR

> "The City Council failed to consider all relevant evidence on the issue of traffic safety."

The findings in support of the city decision appealed in Angel I stated:

> "The City Council reviewed six sources of oral and written testimony in evaluating the proposal for traffic safety. Those sources are as follows, and are cited below * * *:
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> "[Five documents and '[t]estimony of neighborhood associations and residents' are listed.]" Record I 44.

In Angel I, we responded to petitioner's contention that the above quoted findings demonstrated prejudicial error by showing the city council failed to consider all evidence relevant to traffic safety issues, as follows:

> "The parties do not dispute, and we agree, that the city council is required to consider and weigh all evidence before it concerning traffic safety in making a determination on the adequacy of transportation services. See Younger v. City of Portland, 15 Or LUBA 210, 216-217, aff'd 86 Or App 211 (1987), rev'd on other grounds 305 Or 346 (1988). We also agree with respondents that the city is not required to refer to all evidence

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[1]The local record in Angel I is included in the local record of the challenged decision. In this opinion, the local record in Angel I is cited as "Record I ___" or "Supp. Record I ___." The local record compiled after our decision was issued in Angel I, remanding the city's first decision, is cited as "Record ___."

> considered in its findings. Kellogg Lake Friends v. City of Milwaukie, [16 Or LUBA 755, 765 (1988)]. However, by specifically stating the city council 'reviewed six [listed] sources of oral and written testimony in evaluating the proposal for traffic safety,' the above quoted finding implies the city council did not review other, nonlisted evidence regarding traffic safety.
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> "Because the city's findings make it unclear whether the city applied the correct scope of review in considering the traffic safety issue, and this decision must be remanded to the city for further proceedings in any case, we believe the most appropriate course is for the city to consider this issue on remand and clarify whether it considered all relevant evidence in reaching its decision." (Emphasis in first paragraph original; emphasis in second paragraph added.) Angel I, slip op at 21-22.

Petitioner contends this Board determined in Angel I that the city council members did not consider all evidence in the record on traffic safety prior to making the decision appealed in Angel I. Petitioner argues the record after remand shows the council members did not read all relevant evidence on traffic safety between the time the first decision was adopted and the time the challenged decision was made. According to excerpts from petitioner's transcript of an August 21, 1991 city council hearing, petitioner asked each council member taking part in the challenged decision whether the member had, since making the decision remanded by Angel I, "gone back and reread the entire record in this case." Petition for Review 12-13. According to petitioner, the council members' negative

responses indicate the city council did not consider all evidence relevant to traffic safety when making the challenged decision and, therefore, petitioner is entitled to remand of the challenged decision.

Petitioner's argument starts with an erroneous premise. This Board did not determine in Angel I that the city council members had not considered all evidence in the record relevant to traffic safety. We merely stated the findings adopted by the city "make it unclear whether the city applied the correct scope of review," and because the decision had to be remanded to the city in any case, we suggested the city council could "on remand * * * clarify whether it considered all relevant evidence in reaching its decision."[2] (Emphasis added.) Angel I, slip op at 22.

Thus, it is entirely possible the council members had considered all evidence relevant to traffic safety in the record at the time the decision appealed in Angel I was made. Accordingly, even if the council members did not

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[2]The city council responded to our suggestion by including the following statement in the findings addressing traffic safety which it adopted after remand:

> "The City Council considered the record before the Hearings Officer, together with all the other evidence presented before the Council. * * *" Record 28.

We do not suggest, however, that local governments must adopt such a finding in support of all land use decisions. In this case, the need for clarification as to the extent of the decision maker's review of the evidence was created by the decision maker's having previously adopted findings which indicated it may not have considered all relevant evidence.

reread all that evidence, that would not establish they failed to consider all relevant evidence. Further, the council members' responses to petitioner's questions at the August 21, 1991 hearing occurred nearly three months before the final decision was adopted. Therefore, those responses do not establish what evidence the council members had considered at the time the challenged decision was made.

As we stated in Angel I, the city decision maker is not required to demonstrate in its findings that it considered all evidence in the record. See Kellogg Lake Friends v. City of Milwaukie, supra. There is no basis for concluding the members of the city council did not consider all relevant evidence on traffic safety in making the challenged decision.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The City Council erred in applying level of service performance criteria from the [Metropolitan Service District] Regional Plan update."

THIRD ASSIGNMENT OF ERROR

> "The City Council's finding that transportation services will not be adequate is not based on substantial evidence [in] the record as a whole."

The challenged decision denies the proposed zone change solely on the basis of noncompliance with Portland City Code (PCC) 33.102.015(2). PCC 33.102.015(2) provides in relevant part:

> "[In order to approve a rezoning request, it] must be found that services, adequate to support the proposed * * * commercial use * * * are presently available or can be reasonably made available (consistent with the Comprehensive Plan Public Facilities Policies) by the time the use qualifies for a certificate of occupancy from the Bureau of Buildings. For the purposes of this requirement, services include:
>
> "* * * * *
>
> "Transportation capabilities[.]
>
> "* * * * *"

The city concluded transportation services are not adequate to serve the proposed use for three reasons. The city's findings state that if the proposed zone change is approved, there will be (1) unacceptable levels of service at intersections, (2) unacceptable levels of service at access driveways of the proposed use, and (3) hazardous traffic safety problems. Record 35.

Petitioner makes several interrelated challenges under these assignments of error. Petitioner challenges the adequacy of the evidentiary support for all three of the city's reasons for determining the proposal does not comply with PCC 33.102.015(2). Petitioner also challenges the adequacy of the city's findings that the proposed zone change will result in unacceptable levels of service at affected intersections and access driveways. Finally, petitioner challenges the city's determination that the proposed zone change will result in unacceptable levels of

service at affected intersections, because of allegedly improper reliance by the city on the Metropolitan Service District (Metro) Regional Transportation Plan Update.

We address petitioner's challenges to the city's three bases for determining that PCC 33.102.015(2) is not satisfied separately.

A. Level of Service at Access Driveways

1. Findings

With regard to adequacy of the level of service at the access driveways for the proposed use, the findings state:

> "The applicant's analysis projects LOS E[3] at the driveway approaches for the site. [The City] Council has considered the applicant's analysis [of] the downstream effect of queue spillback from the signalized intersection of 39th and Hawthorne, but finds there is a strong possibility of queue spillback to the driveways that will likely increase vehicle delay at the driveways to an unacceptable level." (Emphasis added.) Record 27-28.

Related findings regarding the effect of queue spillback on the access driveways state:

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[3]Petitioner explains "Level of Service" (LOS) as follows:

> "[LOS] is a concept developed to quantify the degree of comfort (including such elements as travel time, number of stops, total amount of stop delay, and impediments caused by other vehicles) afforded drivers as they travel through an intersection or roadway segment. Level of Service descriptions for both signalized intersections * * * and unsignalized intersections (such as the proposed ingress/egress driveways for petitioner's restaurant) range from LOS A, the most adequate level of service, to LOS F, the least adequate level of service. * * *" Petition for Review 8 n 2.

> "* * * A key issue pertaining to traffic safety concerns the spillback effects associated with the northbound queues [on S.E. 39th Ave.], specifically the effects of these queues blocking vehicles attempting to enter and exit the site. A queue spillback to or beyond the site driveway(s) will introduce a sight-distance obstruction, create additional delay for exiting vehicles, and create the potential for a maneuvering hazard when entering or exiting the site. Documents and observations introduced by the applicant confirm that this condition occurs during peak traffic periods. Testimony confirms this condition. The [City] Council is not convinced that increasing the [traffic signal] cycle length at the intersection will eliminate these queues. In fact the evidence suggests that queues may be lengthened by this measure. * * *." (Emphasis added.) Record 30.

Petitioner argues the city's findings are inadequate to establish that the proposed zone change will result in an unacceptable level of service at the access driveways because the findings do not explain "how queue spillback relates to whether an acceptable level of service will exist at the access driveways." Petition for Review 20-21. Petitioner also argues the findings do not establish that there will be an unacceptable level of service at the access driveways because they do not expressly state that queue spillback will result in LOS F at the access driveways. According to petitioner, LOS F, not LOS E as projected by petitioner's consultant, equates to an unacceptable level of

service for an unsignalized intersection.[4] Finally, petitioner argues that the findings do not adequately deal with conflicting expert opinion in the record. According to petitioner, the findings fail to address the conflicting "assumptions and analyses [used by the experts], and explain its basis for accepting or rejecting them." Petition for Review 19.

The above quoted findings explain the city believes queue spillback of northbound traffic on S.E. 39th Ave., from the signalized intersection at S.E. 39th Ave. and S.E. Hawthorne Blvd., will at times block the access driveways for the proposed use, causing increased delays for vehicles attempting to enter and exit the site. We conclude the findings adequately explain the rationale for the city's determination that queue spillback will result in an unacceptable level of service at the access driveways.

Petitioner also argues the city can only determine such

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[4]We note that petitioner's traffic expert submitted a table entitled "General Level of Service Descriptions for Unsignalized Intersections." Supp. Record I 21. That table includes the following qualitative descriptions of LOS E and F:

"E - Represents a condition in which the demand is near or equal to the probable maximum number of vehicles that can be accommodated by the [intersection]
- There is almost always more than one vehicle in the queue
- Drivers find the delays to be approaching intolerable levels

"F - Forced flow
- Represents an intersection failure condition that is caused by geometric and/or operational constraints external to the intersection"

a decreased level of service at the access driveways will be "unacceptable" if it finds the level of service will be LOS F. However, petitioner does not cite any provision of the city comprehensive plan or land use regulations which establish LOS F as a standard for determining the existence of an "unacceptable" level of service at an unsignalized intersection. In the absence of such a standard, we see no reason why the city is required to find that an unsignalized intersection will have LOS F before the city may determine the level of service at that intersection will be inadequate.

Finally, it is well established that while a local government is required to identify in its findings the facts it relied upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on.[5] Gilchrist v. City of Prineville, ___ Or LUBA __ (LUBA No. 90-036, September 6, 1990); Kellogg Lake Friends v. City of Milwaukie, supra; Cope v. City of Cannon Beach, 15 Or LUBA 546, 552 (1987); Ash Creek Neighborhood Ass'n v. City of Portland, 12 Or LUBA 230, 236-38 (1984). In some circumstances a local government might improve its chances

[5]We agree with respondent and intervenors-respondent (respondents) that Younger v. City of Portland, 305 Or 356, 359, 752 P2d 262 (1988) only determines that our review of the substantiality of the evidentiary support for a challenged local government decision must be based on consideration of all relevant evidence in the record, and does not require local governments to address all relevant evidence in their findings.

of prevailing in an appeal challenging the evidentiary support for its decision if it explains in its findings how it resolved conflicts in the evidence, but such findings are not necessary so long as this Board can conclude that a reasonable decision maker could decide as the local government did, in view of all the evidence in the record. Douglas v. Multnomah County, 18 Or LUBA 607, 619 (1990).

This subassignment of error is denied.

2. Evidentiary Support

Petitioner argues that the "whole record" review standard of ORS 197.835(7)(a)(C) requires that we review all relevant evidence in the record.[6] According to petitioner, the evidence relied on by the city council is "either facially insubstantial or is so undermined by other evidence in the record that it cannot be reasonably relied on." Petition for Review 16.

We have reviewed the evidence in the record to which we are cited by the parties concerning the issue of level of service at the proposed access driveways. Record I 86-87, 114, 121-23, 230-31; Supp. Record I 39-40; Record 10-12, 119-128; Respondents' Brief App. 4-8. The evidence cited was submitted by two professional traffic engineers, Wayne Kittelson, petitioner's traffic consultant, and Robert

[6]ORS 197.835(7)(a)(C) provides that LUBA shall reverse or remand a land use decision if the local government "made a decision not supported by substantial evidence in the whole record[.]"

Keech, one of the opponents' traffic consultants. It is undisputed that both engineers based their oral and written testimony on the same raw data collected by Kittelson, but reached different conclusions, and that the city council chose to rely on Keech's conclusions.

Kittelson found there would be an 8.5 percent probability of access driveway blockage, and a 20 percent probability of the presence of a vehicle in an access driveway and, therefore, approximately a 2 percent probability that the two events would occur simultaneously. Supp. Record I 40. Kittelson concluded this probability "is not sufficient to cause significant operational or safety-related problems." Id. Kittelson also recommended that access driveway blockage due to queue spillback could be reduced by increasing the traffic signal cycle length at the S.E. 39th Ave. and S.E. Hawthorne Blvd. intersection or by introducing "protected/permissive phasing for left turn movements" at that intersection. Record I 114, 230-31.

Keech found that Kittelson underestimated the probability of queue spillback causing delays in entering and exiting the access driveways because he failed to consider that queue spillback would increase at peak times as background traffic increased, and relied on an assumption regarding vehicles per hour using the proposed restaurant's drive-through window which was low by 25 to 200 percent. Record I 86-87, 121-22; Record 128; Respondents' Brief

App. 6. Keech testified that increasing the traffic signal cycle length at the S.E. 39th Ave. and S.E. Hawthorne Blvd. intersection would increase queue spillback, by as much as 24 percent. Record I 122-23. Keech also testified that introducing protected/permissive phasing for left turns at that intersection had not been shown to be feasible, due to the potential traffic safety hazard of having drivers at a busy intersection "judging [whether] the gaps are adequate based on their own impressions." Respondents' Brief App. 5-6.

Petitioner does not challenge Keech's professional credentials. However, we understand petitioner to argue that the Keech testimony is insubstantial on its face and is undermined by the Kittelson testimony. Petitioner complains that no data or calculations were offered by Keech to support his conclusion that the proposed increase in traffic signal cycle length at the S.E. 39th Ave. and S.E. Hawthorne Blvd. intersection would increase queue spillback by 24 percent. Petitioner also argues that the Kittelson testimony relies on documented analysis of the adequacy of service and supports Kittelson's conclusion that the proposed increase in traffic signal cycle length will not increase queue spillback.[7]

[7]Petitioner also contends Kittelson's conclusion was supported by the city's traffic staff. However, the transcript excerpt quoted by petitioner indicates only that the city staff believed the proposed increased cycle length "will allow us to serve the traffic at that intersection better."

Respondents contend Keech is a qualified professional traffic engineer (Record 119) and, therefore, his expert testimony is substantial evidence in support of the city's determination. Respondents argue that Keech based his expert testimony on the same data as Kittelson, but simply reached a different conclusion. According to respondents, the local government decision maker is entitled to choose between conflicting believable evidence, and that choice is not a ground for reversal or remand. Wissusik v. Yamhill County, ___ Or LUBA ___ (LUBA No. 90-050, November 13, 1990), slip op 19.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1974); Van Gordon v. Oregon State Board of Dental Examiners, 63 Or App 561, 567, 666 P2d 276 (1983); Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). Where we conclude a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, we defer to the local government's choice between conflicting evidence. Younger v. City of Portland, supra, 305 Or at 360; Wissusik v.

(Emphasis added.) Petition for Review 22 n 8. The staff member's statement does not address the effect of the proposed increased cycle length on the probability of queue spillback blocking the access driveways for the proposed use.

Yamhill County, supra; Vestibular Disorder Consult. v. City of Portland, 19 Or LUBA 94, 103 (1990); Douglas v. Multnomah County, supra, 18 Or LUBA at 617.

Although Kittelson and Keech reached conflicting conclusions, we see nothing in the Kittelson testimony which so undermines the Keech testimony that it is not evidence upon which a reasonable person would rely. Further, Keech's professional credentials as a traffic expert are unchallenged. We, therefore, conclude the Keech testimony is believable expert testimony, and that the city was entitled to choose to rely on the Keech testimony, rather than the Kittelson testimony. Further, we agree with respondents that based on the relevant evidence in the record, a reasonable person could have decided as the city did, that the proposed zone change would result in an unacceptable level of service at the access driveways for the proposed use.

This subassignment of error is denied.

B. Level of Service at Intersections; Traffic Hazards

Respondents contend unacceptable level of service at the proposed access driveways is in itself an adequate basis for finding noncompliance with PCC 33.102.015(2). Respondents argue that if we determine the city's decision on the unacceptability of level of service at the proposed access driveways is valid, we must affirm the challenged decision, regardless of our disposition of petitioner's

challenges to the other two bases for the city's determination of noncompliance with PCC 33.102.015(2).

In approving a proposed zone change, PCC 33.102.015(2) requires the city to determine that transportation "services, adequate to support the proposed * * * use * * * are presently available or can be reasonably made available." No party contends that transportation services can be adequate to serve the proposed use, if the proposed zone change will result in an unacceptable level of service at the access driveways of the proposed use. We, therefore, agree with respondents that our denial of the preceding subassignment of error challenging the city's determination with regard to acceptability of level of service at the access driveways requires that we affirm the city's decision.

The city's decision is affirmed.